

Supreme Court,
FILED

OCT 9 1925

WM. H. STANSE
CL

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1925. No.

227

BURNRITE COAL BRIQUETTE COMPANY,

Petitioner,

v.

**EDWARD G. RIGGS AND ALFRED L. KIRBY AND JOHN P.
DUFFY, AS RECEIVERS OF THE BURNRITE COAL BRIQUETTE
COMPANY,**

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT**

AND

BRIEF IN SUPPORT THEREOF.

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1925.

No.

BURNRITE COAL BRIQUETTE COMPANY,
a corporation,
Petitioner,

VS.

EDWARD G. RIGGS and ALFRED L. KIRBY
and JOHN P. DUFFY, as receivers of
Burnrite Coal Briquette Company,
Respondents.

} Petition for Certiorari.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED
STATES:

The petition of BURNRITE COAL BRIQUETTE COMPANY, a
corporation, respectfully shows:

1. On May 11, 1922, Edward S. Riggs, a citizen and resi-
dent of the State of New York, filed in the District Court of
the United States for the District of New Jersey his bill of
complaint, verified by affidavit, against the petitioner, Burn-
rite Coal Briquette Company, a corporation of the State of
Delaware (R., 7). On filing that bill and affidavits, the Court
ex parte appointed Alfred L. Kirby and John P. Duffy tem-
porary receivers of the petitioner, authorizing them to con-
duct the business theretofore conducted by your petitioner,
and authorizing them to borrow not more than Twenty-five
Thousand Dollars (\$25,000.00) on receivers' certificates, and

requiring your petitioner to show cause why the appointment of receivers should not be continued during the pendency of the suit (R., 19). On May 18, 1922, your petitioner presented its duly verified petition, praying that an order be made directing the receivers to desist and refrain from admitting any person into your petitioner's factory to examine its books, processes or machinery, and to desist and refrain from removing or repairing the property of your petitioner, or incurring any indebtedness or charge against that property, or from disclosing any information secured by them as receivers, and praying that the receivers and the complainant show cause why the receivers should not be discharged (R., 23). On this petition, an order to show cause was made with an *ad interim* restraint (R., 40). Voluminous affidavits were filed on both sides, and both foregoing orders to show cause were duly continued until June 5, 1922, on which date there was filed your petitioner's answer, which, among other things, denied the jurisdiction of the Court (R., 69). After argument, the District Court of the United States for the District of New Jersey, filed an opinion (R., 249), pursuant to which, on July 13, 1922, it made a decree continuing the receivers and the injunctive relief previously granted in the *ex parte* order of May 11, 1922, until final hearing, and added an injunction against your petitioner, its officers and agents, from exercising any of its franchises or privileges (R., 252). No appeal from this order was taken. Your petitioner, through its officers and directors, so far disregarded the assumed jurisdiction of the District Court of the United States for the District of New Jersey, by facilitating an adjudication in bankruptcy pursuant to a petition filed against your petitioner in the District Court of the United States for the District of Delaware, that on October 26, 1922, a petition was filed by the receivers praying that the officers and directors be adjudged in contempt of the District Court of the United States for the District of New Jersey (R., 2). Upon the hearing on the contempt proceedings, the officers and directors urged in the defense of their actions want of

jurisdiction in the Court to make the orders, for the violation of which they were sought to be held in contempt. The time to appeal from the order of July 13, 1922, having expired, the cause was, on November 7, 1922, placed on the calendar for final hearing. On December 1, 1922, notice of a motion to vacate the orders of May 11th and July 13th, 1922, was filed. Your petitioner consenting that final hearing be had on the affidavits previously filed on both sides, final hearing and the hearing on the last mentioned motion was had, upon which the Court, on December 22, 1922, made its final decree, continuing the receivers with all powers theretofore granted, and with all powers conferred upon receivers by an Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporation (Revision of 1896)", continued all the injunctive relief previously granted; adjudged that the business of your petitioner had been grossly mismanaged and had been and was being conducted at a great loss, but adjudged that your petitioner was not insolvent (R., 254). From this final decree, an appeal was promptly taken to the Circuit Court of Appeals for the Third Circuit, and the assignments of error thereunder attacked the Court's taking jurisdiction of the suit and making the orders of May 11th and July 13th, 1922, as well as the final decree directly appealed from (R., 256). The Circuit Court of Appeals, after argument, filed its opinion (R., 263) sustaining your petitioner's contention and on August 11, 1923, sent to the District Court its mandate which provided:

"that the decree of the said District Court in this cause be, and the same is hereby reversed with costs, and the cause remanded to the said District Court with instructions to dismiss the bill on the ground that the company in question being a solvent foreign corporation, the Court had no jurisdiction to appoint receivers."

On the coming down of that mandate, the petitioner moved the District Court to comply with the terms thereof and to dismiss the bill, order the receivers to turn over the property forthwith and to account with all convenient speed.

This the Court refused to do, but on January 24th, 1924, made an order (R., 279) which provided, as follows:

"and this Court being of opinion that the receivers should account before the bill be dismissed,

It is, thereupon, on this 24 day of January, 1924, ORDERED that Alfred L. Kirby and John P. Duffy do account to this Court, as receivers of the defendant above named

* * * * *

that all further equity abide the order of this Court upon the hearing on the said account and exceptions thereto."

The Receivers filed an account (R., 280) which was in such an unintelligible form that your petitioner filed exceptions thereto (R., 300). On February 21st, 1924, after those exceptions had been filed, the Court made an order referring it to a Master to take and state the account of the receivers, and reserving all further equity until the hearing on the account and the exceptions thereto (R., 304). Hearings were had before the Special Master, and in July, 1924, he filed his report stating the receivers' account and, unvarrentedly, your petitioner contends, passing on the exceptions taken to the account as filed originally by the receivers (R., 423). Exceptions were filed by your petitioner to the Master's report (R., 551). The exceptions to the receivers' account as originally filed, the exceptions to the Master's report, and the equity reserved in the order of January 24, 1924, were all brought on before the District Court of the United States for the District of New Jersey, and that Court, on December 19, 1924, made a decree (R., 565), by which decree the District Court of the United States for the District of New Jersey, ordered, adjudged and decreed, as follows:

"that the account of the receivers and the report of the special master herein be and the same is hereby ratified and confirmed, and the items contained in said account and report as disbursements are hereby approved as proper disbursements and as charges against the prop-

erty in the hands of the receivers, and that the indebtedness of the receivers, as stated in said report and account, not paid, be and the same is hereby adjudged to be a proper lien and charge upon the property now in the control of the receivers belonging to the defendant corporation, and that the allowances herein made for fees of the special master and the receivers and counsel be and the same are hereby adjudged to be proper liens and charges upon the property in the control of the receivers belonging to the defendant corporation."

The decree went on to make allowances to the receivers and their counsel, directed your petitioner to pay to the receivers the amount of their indebtedness as disclosed by their account and report, together with the allowances, within five days, and, upon such payments being made, directing the receivers to release your petitioner's assets to it and that the bill be dismissed, but providing that in default of such payment that the property of your petitioner in the possession of the receivers be sold. From this decree, as modified by an order made January 3, 1924 (R., 567), your petitioner appealed again to the Circuit Court of Appeals for the Third Circuit, assigning for error among other things, the District Court's failure in its order of January 24, 1924, to order the receivers forthwith to turn over your petitioner's property to your petitioner, and in permitting the receivers to hold possession of your petitioner's property pending their accounting, and also the District Court's decreeing, in the decree directly appealed from, that the disbursements of the receivers, their indebtedness, and the allowances, were a proper charge or lien upon the property of your petitioner in the receivers' hands, and ordering a sale of that property to raise the indebtedness and allowances (R., 569). After argument, the Circuit Court of Appeals for the Third Circuit filed a short opinion of affirmance (R., 579), and, on June 27, 1925, made its decree affirming, with costs, the decree of the District Court appealed from, namely, that of December 19, 1924 (R., 582). The mandate went down on July 27, 1925.

2. Your petitioner is advised that the Circuit Court of Appeals for the Third Circuit was in error in affirming the decree of the District Court of the United States for the District of New Jersey last appealed from, but, for the reasons hereinafter stated, should have reversed the same, and your petitioner is further advised, for the reasons hereinafter stated, that this cause is one in which it is proper for this Court to issue a writ of certiorari.

3. On the first appeal, the Circuit Court of Appeals for the Third Circuit held that the District Court of the United States for the District of New Jersey had no jurisdiction to appoint the receivers, and directed the District Court to dismiss the bill on the ground that your petitioner, being a solvent foreign corporation, the District Court had no jurisdiction to appoint receivers. Notwithstanding this adjudication, the Circuit Court of Appeals, by its second decree, which is now sought to be reviewed by this Court, sanctioned the District Court in making the indebtedness of the receivers and allowances to them and their counsel, charges upon your petitioner's property, which the Circuit Court of Appeals had previously adjudged had been seized without jurisdiction. The Circuit Court of Appeals attempts to justify this decision on the ground that your petitioner acquiesced in the District Court's jurisdiction to make the appointment of receivers by the interlocutory orders prior to the final decree directly appealed from. The facts are not at all in dispute. The record is clear as to what your petitioner did and did not do. A brief resumé of that follows:

FIRST: The bill on its face showed that the District Court of the United States for the District of New Jersey was without jurisdiction because neither the plaintiff nor the defendant was a resident of that district. Pursuant to the *ex parte* order made on this void bill, the receivers were appointed and took possession of all of your petitioner's property which they still hold.

SECOND: Your petitioner opposed the bill vigorously on the facts, denying the insolvency alleged in the bill as the ground for the appointment of receivers, and, therefore, urging that the District Court should not appoint receivers. Your petitioner's then counsel did not specifically say that the fact that your petitioner was solvent deprived the Court of jurisdiction to appoint receivers, but such counsel then urged want of jurisdiction in the Court on other grounds.

THIRD: After argument, the District Court agreed with your petitioner that your petitioner was not then insolvent, but, nevertheless, ruled that the lack of insolvency was no bar to the appointment of receivers, overruled your petitioner's jurisdictional contention and made an order continuing the receivers until final hearing.

FOURTH: This order made in midsummer was not itself appealed from, but your petitioner, through its Board of Directors, passed a resolution to facilitate an adjudication of your petitioner's bankruptcy by the Court of its domicile (Delaware), the necessary result of which adjudication would be the removal of your petitioner's property from the hands of the receivers. The passing of this resolution was, undoubtedly, a violation of the terms of the injunctive provisions of the order not so appealed from, and your petitioner's directors opposed the contempt proceedings immediately brought against them, by urging that the District Court was without jurisdiction because your petitioner was solvent and a corporation foreign to the jurisdiction in which the District Court sat. The time to appeal from the afore-said interlocutory order having expired, your petitioner facilitated an early final hearing, at which the District Court made a decree making permanent the appointment of the receivers. This final decree was promptly appealed from, and was reversed with directions to dismiss the bill, on the ground that the District Court had no jurisdiction to appoint receivers. After this decision, the District Court and the

Circuit Court of Appeals both have ordered the tangible property, real and personal, of your petitioner, still in the receivers' hands, to be sold to meet the indebtedness of the receivership and allowances to receivers and counsel, without discrimination as to whether such indebtedness was incurred before or after the appeal.

The error of the District Court and the Circuit Court of Appeals is three-fold:

(a) The so-called acquiescence was an immaterial fact, and the property of your petitioner, having been seized without jurisdiction, must be returned. It cannot be sold to pay expenses of the void receivership.

(b) When the record shows, and the Court finds that the defendant corporation vigorously opposed the appointment of receivers uninterruptedly from first to last, the Court cannot examine into the details of such opposition, and, on any technical ground or reason not negating the fact of continued opposition to the receivership, find such acquiescence by the corporation as would charge it with the expense of the receivership.

(c) When the Court, on examining into the details of such opposition, purports to find acquiescence only for a short time and in interlocutory orders, the Court cannot, on this account, charge the corporation with the indebtedness of the receivership incurred after such acquiescence had admittedly ceased, and after the interlocutory orders had been superseded by a final decree which admittedly was never acquiesced in.

4. This decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same subject.

Couper vs. Shirley, 75 Fed. 168 (C. C. A., 9, 1896);
Beech vs. Macon, &c., Co., 125 Fed. 513 (C. C. A.,
 5, 1903);

Chicago, &c., Co. vs. Newman, 183 Fed. 573 (C. C. A., 7, 1911) ;

Hawes vs. First National Bank of Madison, 229 Fed. 51 (C. C. A., 8, 1915) ;

Frier vs. Weakley, 261 Fed. 509 (C. C. A., 8, 1919) ;

Bricton Mfg. Co. vs. Woodrough, 284 Fed. 484 (C. C. A., 8, 1922).

It is also probably in conflict with the decision of this Court in the case of *Lion Bonding Co. vs. Karatz*, 262 U. S. 640. The Circuit Court of Appeals, by the decree complained of, decides an important question of general law in a way probably untenable and in conflict with the weight of authority. That the question of how far the property of a corporation, seized by a receiver, shall be responsible for the expenses of a receivership, is an important question of general law is obvious. This Court has in the past so held, by issuing its certiorari to Circuit Courts of Appeals to bring up such questions.

See

Atlantic Trust Co. vs. Chapman, 208 U. S. 360 ;

Palmer vs. Texas, 212 U. S. 118 ;

Lion Bonding Co. vs. Karatz, 260 U. S. 640.

To show that the decision of the Circuit Court of Appeals is untenable and in conflict with the weight of authority, your petitioner refers to the brief hereunto annexed. For the same reason the Circuit Court of Appeals, by affirming the decision of the District Court complained of, has so far sanctioned such a departure by the District Court from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

5. Your petitioner presents herewith, as part of this petition, a brief and a transcript of the record in the Circuit Court of Appeals.

YOUR PETITIONER RESPECTFULLY PRAYS that a writ of certiorari issue out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case, which was entitled in that Court, to the end that the said cause will be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

BURNRITE COAL BRIQUETTE COMPANY

By ROBERT H. McCARTER, and
G. W. C. McCARTER

Solicitors and Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES

BURNRITE COAL BRIQUETTE COMPANY,
a corporation,
Petitioner,

VS.

EDWARD G. RIGGS and ALFRED L. KIRBY
and JOHN P. DUFFY, as receivers of
Burnrite Coal Briquette Company,
Respondents.

On Petition for
Certiorari.

BRIEF IN SUPPORT OF PETITION.

A.

SUBJECT INDEX.

Argument (Summary)	PAGE 16
Argument (At Length).....	17
Assignments of Error Relied on.....	14
Jurisdiction of this Court.....	13
Statement of Case.....	14

TABLE OF CASES AND STATUTES

Title of Case.	Page of Brief Cited.
Atlantic Trust Co. <i>vs.</i> Chapman, 208 U. S. 360....	9, 13, 27, 28
Beech <i>vs.</i> Macon, &c., Co., 125 Fed. 513.....	8, 29
Brietson Mfg. Co. <i>vs.</i> Woodrough, 284 Fed. 484.....	9, 25
Central Trust Co. <i>vs.</i> Seasongood, 130 U. S. 482.....	31
Chicago, &c., Co. <i>vs.</i> Newman, 187 Fed. 573	9, 24
Clark <i>vs.</i> Brown, 119 Fed. 130.....	29
Couper <i>vs.</i> Shirley, 75 Fed. 168.....	8, 21
Fryer <i>vs.</i> Weakley, 261 Fed. 509.....	9, 24
Greenbaum <i>vs.</i> Lafayette, &c., Co., 128 Atl. 168....	30
Hawes <i>vs.</i> First National Bank, 229 Fed. 51.....	9, 24, 27
Henning <i>vs.</i> Eldredge, 148 Ill. 305.....	36
Hernandez <i>vs.</i> Brookdale Mills, 134 N. E. 568.....	33
<i>In re</i> Hurlburt Motors, Inc., 275 Fed. 62.....	25
Knickerbocker Trust Co. <i>vs.</i> Oneonta, 94 N. E. 871..	35
Lion Bonding Co. <i>vs.</i> Karatz, 262 U. S. 640....	9, 13, 18, 27
Mendenhall <i>vs.</i> Hall, 134 U. S. 559.....	31
Palmer <i>vs.</i> Texas, 212 U. S. 118.....	9, 13, 19, 28, 29
Silva <i>vs.</i> Pickard, 47 Pac. 144.....	36
Thompson <i>vs.</i> Maxwell Land Co., 168 U. S. 451.....	36
Wakelee <i>vs.</i> Davis, 44 Fed. 532.....	36
Judicial Code § 240 as amended by § 1 of 43 St. L. 936	13
Judicial Code § 813.....	20

B.

The opinion of the Circuit Court of Appeals on the first appeal is reported at 291 Fed. 754. The opinions of the District Court and of the Circuit Court of Appeals on the second appeal, namely, the opinion sought to be reviewed have not been reported.

C.

1. The judgment to be reviewed was entered June 27, 1925 (R., 582).

2. The making of the said decree of June 27, 1925 (R., 582) is relied on as the basis of this Court's jurisdiction.

3. The statutory provision under which such jurisdiction is invoked is subdivision *a*, Section 240 of the Judicial Code, as amended by Section 1 of an Act of Congress entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court and for other purposes", approved February 13, 1925, 43 Statutes at Large, 936, 938, which reads:

"(a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

4. We know of no reported cases under the Act of February 13, 1925, but, among the many cases under pre-existing law, refer to *Atlantic Trust Co. vs. Chapman*, 208 U. S. 360; *Palmer vs. Texas*, 212 U. S. 118, and *Lion Bonding Co. vs. Karatz*, 262 U. S. 640.

D.

For a concise statement of the case, we refer to paragraph 1 of the petition for certiorari, hereunto annexed.

E.

The assignments of error relied on for this application are:

1. The Court erred in its order made and entered the twenty-fourth day of January, 1924, in not ordering the receivers of the defendant forthwith to turn over the defendant's property to defendant, and in permitting the receivers to hold possession of the defendant's property pending their accounting.

29. The Court erred in decreeing, in and by its decree made and entered on December 19, 1924, as follows:

"That the indebtedness of the receivers as stated in said report and account, not paid, be and the same is hereby adjudged to be a proper lien and charge upon the property now in the control of the receivers belonging to the defendant corporation."

30. The Court erred in decreeing, in and by its decree made and entered on December 19, 1924, as follows:

"That the allowances herein made for fees of the Special Master and the receivers and counsel be and the same are hereby adjudged to be proper liens and charges upon the property in the control of the receivers, belonging to the defendant corporation."

31. The Court erred in decreeing, in and by its decree made and entered on December 19, 1924, as follows:

"That the said defendant corporation do pay to the said receivers the amount of the indebtedness of the said receivers as disclosed by their account and report together with the amount allowed to counsel for their compensation and to the special master for his services."

32. The Court erred in decreeing in and by its decree made and entered on December 19, 1924, as follows:

"That if said payments be not made within the time aforesaid then that the property of the defendant corporation within the control of the receivers be sold at such time and under such conditions as this court may by subsequent order herein direct, upon application to be made to this court by either party upon five days' notice to the solicitor of the other, to raise and pay said moneys aforesaid to the receivers, and upon such money being raised and paid what shall remain of the assets of the said corporation shall be paid or delivered to the said defendant corporation less the expenses of sale, and whatever turne allowances may be made by this court to the receivers and counsel and whatever indebtedness the receivers may be obliged to incur approved by the court, and that upon the consummation of said sale and the raising and payment of said moneys aforesaid and the payment of whatever balance there may be to the corporation that the bill be dismissed."

The "Court" referred to in the assignments of error is, of course, the District Court. Additional assignments of error will be relied on at final hearing should the Court decide to issue its certiorari.

F.**ARGUMENT.****SUMMARY.****I.**

The Court having no jurisdiction to appoint receivers had no jurisdiction to make the indebtedness of and allowances to the receivers and their counsel charges upon the petitioner's property seized without jurisdiction.

II.

When the record shows and the Court finds that the defendant corporation, the petitioner, vigorously opposed the appointment of receivers uninterruptedly from first to last, the Court cannot examine into the details of such opposition, and, on any technical grounds or reason not negating the fact of continued opposition to the receivership, find such acquiescence by the corporation as would charge it with the expenses of the receivership.

1. The facts.
2. The authorities.
3. Authorities relied on by the respondents.
4. The failure to appeal from the order of July 13th, 1922.
5. The alleged delay in intimating lack of jurisdiction.

III.

Acquiescence cannot possibly justify indebtedness incurred after the acquiescence ceased.

IV.

Refutation of certain arguments that may be advanced by the respondents.

I.

The Court having no jurisdiction to appoint receivers had no jurisdiction to make the indebtedness of and allowances to the receivers and their counsel charges upon the petitioner's property seized without jurisdiction.

The situation cannot be better stated than it was in the opinion of the Circuit Court of Appeals on the first appeal (R., 263) :

"The appointment of receivers for a corporation is a matter of grave concern, because it takes its property, and the management thereof, out of the hands of those in whom the law vested it. It follows, therefore, that when a court exercises this power, its warrant so to do must be shown. Such action, over the protest and objection of the company, the District Court of New Jersey took in the appointment of receivers for the Burnrite Coal Briquette Company, a corporation of the State of Delaware, which Company that Court at the same time found was not insolvent. Such being the case, the basic and controlling question here involved is: Did the District Court of the United States for the District of New Jersey have jurisdiction to appoint receivers for a solvent foreign corporation? In our opinion, it had not, and the reason for so holding is that the law of New Jersey, as interpreted by its highest tribunal, has given no such power over foreign corporations to its own local courts, and the jurisdiction of the Court below was in that particular determined by that of the State courts."

After discussing the New Jersey cases, the Circuit Court of Appeals in their opinion concluded (R., 266) :

"It thus appearing that under the decisions of the highest tribunal of New Jersey, courts of that State had no statutory authority to appoint receivers for a solvent

foreign corporation, it follows the United States District Court of New Jersey had no such authority and should have refused to entertain this bill.

This basic jurisdictional question being determinative of the case, it follows that the terms of the order, which the Court made in a case when the Court had no power to make any order at all, constitute matters to which we need not advert. The case will, therefore, be remanded to the Court below, with instructions to dismiss the bill on the ground that the company in question being a solvent foreign corporation, the Court below had no jurisdiction to appoint receivers."

Pursuant to this opinion, there was made by that Court the decree of August 11, 1923 (R., 267).

The case, therefore, is one in which the District Court had no power to make any order at all. It is in principle, therefore, covered by the decision of this Court in *Lion Bonding Company vs. Karatz*, 262 U. S. 640. In that case, the District Court appointed a receiver and its action was affirmed by the Circuit Court of Appeals. On Certiorari, however, the Supreme Court held that the District was without jurisdiction, ordered a reversal and directed that the bill be dismissed (262 U. S. 77). Before the mandate issued, the receivers applied for modification of the decrees of the Supreme Court. They asked for approval of disbursements or expenses of the receivership, paid by them out of moneys realized from the assets of the corporation. They asked that they and their counsel be paid and that the creditors who filed their claims only in the Federal Court be protected by the order of the Supreme Court on the receiver in the State Court to take proceedings to protect such creditors. In denying the motion Brandeis, J., for the Court said:

"This Court is without power to grant any part of the relief sought. The District Court was without jurisdiction as a federal court to appoint receivers in, or otherwise to entertain, the Karatz suit. For this reason, among others, the Hertz suit, a dependent bill, was dismissed. As the lower federal courts lacked jurisdiction,

they are necessarily without power to make any charge upon, or disposition of, the assets within their respective districts. Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court. Where a case is dismissed for want of jurisdiction as a federal court, there is not even power to award costs against the defeated party. The case at bar is unlike *Palmer v. Texas*, 212 U. S. 118, 132, upon which the receivers rely. In that case the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There the Circuit Court had jurisdiction as a federal court; but the decree appointing the receiver was reversed, because it was erroneous.

Obviously, the Court has no power to direct the Department of Trade and Commerce of Nebraska to apply to the state court for the order allowing creditors to prove their claims in that court. Our jurisdiction is limited in this proceeding to the correction of the errors committed by the lower federal courts in taking jurisdiction and in granting relief. The only course open to the creditors, as to the receivers and their counsel, is to apply to the state court."

In the case at bar, at the time of the original appointment, the District Court for New Jersey had no jurisdiction as a federal court, by reason of the non-residence of both parties. That particular jurisdictional defect was cured, but the lack of power to seize the property of the petitioner remained throughout. Jurisdiction is power and power is jurisdiction. Parties cannot confer power on the federal courts where it does not exist. The question of acquiescence, therefore, is wholly immaterial.

II.

When the record shows and the court finds that the defendant corporation, the petitioner, vigorously opposed the appointment of receivers uninterruptedly from first to last, the court cannot examine into the details of such opposition, and, on any technical ground or reason not negating the fact of continued opposition to the receivership, find such acquiescence by the corporation as would charge it with the expenses of the receivership.

1.

The Facts.

The jurisdiction of the District Court, as a federal court, depended solely upon diversity of citizenship. The bill of complaint, on its face, showed that the plaintiff, Riggs, was a citizen and resident of New York, and the defendant a corporation, and, therefore, a citizen of Delaware (R., 7). On this bill of complaint, which, under Section 813 of the Judicial Code, showed that the Court was without jurisdiction, the Court, *ex parte*, made its order of May 11, 1922 (R., 19), appointed receivers, directed them to conduct the petitioner's business, and authorized them to issue receivers certificates. Unfortunately, the petitioner, instead of appearing specially, presented its petition (R., 23), praying for the discharge of the receivers, and, on this petition, obtained a temporary limitation of their activities. The bill of complaint charged that the petitioner was insolvent. The voluminous affidavits on both sides were directed largely to this question, and the answer filed for the petitioner (R., 69) challenged the jurisdiction of the Court. After argument, the District Court made its order of July 13, 1922 (R., 252). This action was

excellently summarized by the Circuit Court of Appeals in its first opinion (R., 263) as follows:

"Such action, over the protest and objection of the company, the District Court of New Jersey took in the appointment of receivers for the Burnrite Coal Briquette Company, a corporation of the State of Delaware, which Company that Court at the same time found was not insolvent."

Hitherto, there was certainly no acquiescence. The order of July 13th, although appealable, was not appealed from, but the directors of the petitioner so far disregarded it that they were cited for contempt. After the time to appeal had expired, the petitioner facilitated an early final hearing, at which it moved to discharge the orders of May 11th and July 13th, 1922. On the final hearing, the Court made its final decree (R., 254) which was promptly appealed from, under assignments of error challenging all of the action of the Court from beginning to end (R., 256). It was this decree that the Circuit Court of Appeals reversed. After the decree of dismissal and with the mandate directing the District Court to dismiss the bill for want of jurisdiction, that Court, nevertheless, permitted its receivers to hold on to the petitioner's property (which they still hold) and made the indebtedness of the receivership and allowances to the receivers and counsel a charge on that property, which it ordered sold to make the same. The District Court, in so doing, acted directly in the teeth of numerous decisions in the Federal Courts.

2.

The Authorities.

Couper vs. Shirley, 75 Fed. 168 (C. C. A., 9, 1896). In this case, the Circuit Court had *ex parte* appointed a receiver in foreclosure, relying upon a stipulation in this mortgage authorizing such appointment. Such appointment, however, was directly prohibited by a statute in Oregon, where the

land lay, so that, upon this being called to the court's attention, the appointment was held to be contrary to public policy, and the receiver was discharged, and ordered to pay over to the defendant all the defendant's money and property in his hands, without deduction for allowances to the receiver or counsel. The receiver appealed from this order, which was affirmed, the court saying at page 171:

"Appellant claims that it was inequitable for the court, after appointing Couper receiver, to dismiss him without making some provision to pay him for his services and for the expenses by him incurred. The answer is that the court had no authority to make the appointment. It was made *ex parte*, without discussion. When the question properly came before the court, the receiver was removed. It may be that some provision ought to have been made for his pay, but it is clear to our minds that, upon the facts presented in this case, the party who improperly procured the appointment of the receiver should have been required—if the receiver was entitled to anything—to pay his expenses and services. Certain it is that the appellees, not being responsible for his appointment, could not be held liable; and, as against them, appellant is not entitled to any relief. The judgment of the circuit court is affirmed, with costs."

Beech vs. Macon, etc., Co., 125 Fed. 513 (C. C. A., 5, 1903). A petition in involuntary bankruptcy was filed against Beech. The petitioning creditors procured *ex parte* the appointment of a receiver, who took possession of live stock, some of which was in the possession of D, who claimed to own it. The court made an order for the sale of the live stock, at which sale D bought in the stock, which she claimed to own, and obtained possession of it. This sale was confirmed by the District Court. On petitions by B and D to superintend and revise the orders appointing the receiver, and confirming the sale, the Circuit Court of Appeals ordered the money returned to D, and that the petitioning creditors pay all costs, including the compensation of the receiver. A mandate to this effect went down. On receipt of that mandate, the District Court directed the petitioning creditors

should pay to B and D the amounts theretofore allowed and paid out by the receiver out of the funds in his hands, the cost of the receivership, including the receiver's compensation, and his expenses, but permitted the receiver to deduct from the fund in his hands the expenses of the receivership in the necessary preservation and keeping of the estate, adjudging that to be a proper charge against the fund. This was the cost of keeping the live stock. B and D then filed a petition with the Circuit Court of Appeals to revise the order of the District Court entered on the mandate. The Circuit Court of Appeals held that the District Court should not have deducted the cost of keeping the live stock, saying on page 515:

"It is a principle of general application that, if the appointment of a receiver is erroneous or void, and the adverse party does not acquiesce in it, but continues to contest it to a successful termination, any compensation which may have accrued to the receiver in the meantime, and his expenses incurred in the administration of the estate, should be taxed to the parties who applied to have the appointment made."

and at page 517:

"If it should be held that, although the defendant succeeded in having reversed and set aside the order appointing the receiver, he was responsible for the expenses of the receiver in buying feed for the stock, the application of such sale, it seems to us, would lead in many cases to the greatest injustice. If the litigation was protracted, and some considerable time elapsed before the order appointing the receiver was vacated the expenses would often more than equal the value of the property."

* * * * *

The property having been taken from the defendants against their consent under an erroneous order, which they resisted successfully in an appellate court, the only proper course is to return the property without charge of any kind against it or against the successful defendants. The defendants should be put in their former condition as nearly as possible. Instead of any sum being taxed against the defendants under such circumstances, they would be entitled in some jurisdictions to recover

damages, in a proper action, for being deprived of the use of the property. The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs expenses incurred by their wrongful application. In the event of their insolvency, any expenses incurred by the receiver should fall on him, and not on the defendants. He need not become receiver unless he chooses, or he may require a bond of indemnity before accepting the position. In a case, therefore, where the receiver has been wrongfully appointed, and the order subsequently vacated, it would be more equitable that the receiver himself should sustain the loss or expenses of the receivership paid by him than that they should be taxed to the successful defendants.

Chicago, etc., Co. vs. Newman, 187 Fed. 573 (C. C. A., 7, 1911). This case was commenced in the state court where a receiver was appointed, and then was removed to the federal court, which dismissed the bill on the ground that the court would not interfere with the internal affairs of a foreign corporation, and ordered the receiver to turn back all property, and to present his account within three days. The receiver sought to obtain compensation for himself and attorney. The court held that the receiver must pay over all to the defendant, and look to the complainant for reimbursements. The receiver appealed, and the Circuit Court of Appeals affirmed the Circuit Court.

Fryer vs. Weakley, 261 Fed. 509 (C. C. A., 8, 1919). The court's decision on our point appears from the following quotation of the opinion on page 514:

"The conclusion is that this case falls clearly without the jurisdiction of this court, under the opinion of Judge Carland in *Hawes v. First National Bank*, 229 Fed. 51, 143 C. C. A. 645. The order of the court below appointing the receiver must therefore be reversed, and the case must be remanded to the District Court, with directions to cause all the moneys and property and all the proceeds of the property seized or collected by the receiver to be paid over and delivered to the defendants

W. S. Fryer and G. L. Fryer, and to tax the costs and expenses of the receiver against the plaintiff below. The court, being without jurisdiction, has no property to pay them. As was well said by Judge Carland in the *Hawes* Case: 'Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment. * * * Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court.'

Brixtson Mfg. Co. vs. Woodrough, District Judge, 284 Fed. 484 (C. C. A., 8, 1922). This was a petition by the defendant for a mandamus to the District Judge to comply with the mandate of the Circuit Court of Appeals. The decision appears from the following quotation from the head-note:

"Where appointment of receiver in stockholders' suit was reversed for lack of jurisdiction of the trial court and case remanded with directions that the receiver be required to return all property in his hands to those from whom he received it and that the bill of complaint be dismissed, it was error for the trial court to dismiss the complaint but to order that property in the receiver's hands be impounded in his hands pending further proceedings on an intervention petition: for, where possession of property is acquired, without jurisdiction, such possession will not itself confer jurisdiction, * * *."

A problem somewhat similar to that before this court was before Judge Learned Hand in the case of *In re: Hurlburt Motors, Inc.*, 275 Fed. 62 (1920). In that case, a petition in bankruptcy was filed against the respondents, and a receiver appointed. The respondents unsuccessfully moved to vacate the receivership. The receiver had conducted the business at a profit of some \$2,900, pending the proceedings in which a jury found the respondents solvent. The respondents applied for an order dismissing the petition,

and directing the receiver to turn over the assets. Judge Hand said, at page 63:

"I think that the rule is that the defendant's or respondent's estate is not liable for the receiver's debts or his compensation beyond the amount of the profits realized or improvements arising through profits. * * * As to anything more, the receiver and his creditors have the responsibility only of the plaintiffs or petitioners.

Therefore, if the receiver had in his hands no more than the original value of the property seized, he would be obliged to turn back everything to the respondents and look wholly to the petitioners for his compensation and so would his creditors. The respondents not only did not consent, but actively opposed the seizure; they could not be required to pay the expenses. It appears, however, that the receiver has now in his hands more than the amount of property received by about three thousand dollars. This is obviously not a profit till his debts and his own allowances are paid, and there is no propriety in paying it over to the respondents. True, their own profits might have been as much or more, and, if so, they have recourse against the petitioners for the loss; but as against the receiver and his creditors they must yield. The proper result, if all could be worked out, would be this: The receiver and his creditors should be entitled to the profits, when ascertained, in payment of their claims, and the petitioners should pay any balance; the respondents should be entitled to collect from the petitioners the allowance of their counsel and any profits they could show they have lost by reason of the mistaken seizure.

Unfortunately, this would take time, and meanwhile the respondents would be kept out of their property, which they need at once, if it is to be saved at all. Some present solution must be found, if only provisional. The best which I can devise is this: The receiver's accounts show an estimated profit of \$3,000; they are in evidence and can be referred to. So much of the assets he should be allowed to retain against his debts and his allowances. He will turn over the other assets forthwith to the respondents. Then he will state his accounts to a special master, who will fix his profits, state his unpaid debts, and fix his allowance and that of his attorney.

At the same time the respondents will have the allowance fixed of their counsel, and prove what, if any, profit they have lost during the period of the receivership. When these figures are found, an order may pass directing the petitioners to pay to the respondents their counsel fee and the profit lost by them by reason of the seizure, also to the receiver and his creditors any unpaid balance, the respondents shall be liable to an amount equal to the difference between the profits as found and the sum retained by the receiver."

That case is a stronger one for the receiver than the case at bar, because, on the face of the original papers, the court had jurisdiction to appoint receivers, and, furthermore, because by accounts filed in the cause, a profit in the operation of the business was shown.

Hawes vs. First National Bank of Madison, 229 Fed. 51 (C. C. A., 8, 1915). In this case the District Court appointed a receiver but the Circuit Court of Appeals reversed the appointment on the ground that the District Court was without jurisdiction by reason of the absence of an indispensable party. It held that the receiver was illegally appointed, therefore, and reversed the District Court. In disposing of the receiver's contention that the costs of the receivership should be paid out of the property, the Court said, "In the case at bar, the court, being without jurisdiction, has no property with which to pay any one, and hence is not ruled by *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155. Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court."

A most important decision is *Lion Bonding Company vs. Karatz*, 262 U. S. 640, cited under Point I hereinabove.

3.

Authorities Relied on by the Respondents.

There are only four cases relied on by the respondents which deserve comment.

Atlantic Trust Company vs. Chapman, 208 U. S. 360. In this case, a receiver in foreclosure had been appointed and performed his duties. No attack on the receivership or on the jurisdiction of the Court was made, but the property did not bring sufficient to meet the expenses incurred by the receiver. An attempt was made to charge these expenses against the complainant, which the Circuit Court of Appeals sustained. This Court, on certiorari, reversed the Circuit Court of Appeals. The case, therefore, decided only that the costs of a valid receivership, which realized a deficiency, cannot be charged against the complainant. It decided nothing else.

Palmer vs. Texas, 212 U. S. 118. A state court of Texas had appointed a receiver for a corporation, which appealed from the appointment, and made the appeal a supersedeas, so that, pending that appeal, the state receiver relinquished possession. The action in question was then commenced in a federal court in Texas, and a receiver appointed, which appointment was reversed by the Circuit Court of Appeals as erroneous. The case was then brought to the Supreme Court by certiorari, after the Circuit Court of Appeals had assessed the costs of the receivership against the plaintiff. All that appears in the opinion of this Court on the question of costs is the following (p. 132) :

“We think the Circuit Court of Appeals was right in reversing the order of the Circuit Court appointing the receiver. In that court the costs of the receivership were assessed against Palmer, the original complainant. The receivership has gone on pending the proceedings upon appeal and we are of opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal Court, and it is so ordered;
* * *

In the argument for the petitioners, the following facts appear, however (p. 120) :

“The Court of Appeals was also wrong in directing that the costs of the receivership be taxed against the complainant. That was a question between the parties to

the suit, and was not involved in the appeal of the State of Texas and Eckhardt from the orders refusing their application, and the materials necessary for determining how the costs of the receivership should be borne were not before the court. Those costs were not part of the costs of the appeal. By the effect of the supersedeas, the property and business of the company remained in its hands in the same manner as if there had been no judgment or order of the state court. The expenses of the receivership were a part of the expenses of carrying on the business, and should be dealt with accordingly. If the State should ever be in a position to call for an account of the business of the company during the pendency of the appeal in the state courts, the question how the expenses of the receivership should be borne may arise. But it does not arise upon the appeal in this case, and the expenses ought not to be saddled on the plaintiff without an inquiry."

Among the differences between *Palmer vs. Texas* and this case, are the following:

In that case, the receivership was erroneous. In this case, the Court had no jurisdiction to seize the property through its receivers. In that case, the costs were saddled on the plaintiff without an inquiry, and without the Court having before it the materials necessary for determining how the costs of the receivership should be borne. In this case, the bearing of the costs of the receivership was one of the principal questions litigated after the coming down of the first mandate from the Circuit Court of Appeals. In that case, the receivership, although erroneous, had realized a fund in the Federal Court, out of which the costs could be and were paid. In this case, the receivership has not realized any fund, and the decree sought to be reviewed will, if not reversed, permit the petitioner's property, seized without right, to be sold to pay the expenses of the seizure and the fees of the receivers and their counsel.

Clark vs. Brown, 119 Fed. 130. This case is important as showing what facts were held to constitute sufficient acquiescence to prevent the corporation from objecting to

paying for the costs of an erroneous receivership. The Circuit Court of Appeals said:

"Moreover, notwithstanding the recital in the stipulation for the sale of the flax by the receiver that he had been appointed 'over the objection and opposition of the defendant,' it fully appears from the record that, while defendant did not directly consent to the appointment, he made no objection to it having color of seriousness or force. His answer to the order to show cause why a receiver should not be appointed was irrelevant. It was merely a statement that he was willing to pay complainant what the Court should find him entitled to on a contract with another for sale of the land, if complainant would execute to defendant a warranty deed of the land. * * * And although, in the stipulation mentioned, it was recited that it should be 'without prejudice to the right of said defendant to a review upon appeal of the order of the Circuit Court appointing said receiver,' it appears from the assignment of errors on the appeal which followed to this Court, and which are set forth in the present record, that no question was raised or presented on that appeal as to the appointment of the receiver. As the appointment of the receiver was a proceeding in the cause prior to that appeal, the failure to question it upon that appeal was an acquiescence in the receivership, and no dispute as to the propriety or regularity of the appointment when made could afterwards be considered. * * * Here the appointment of the receiver was proper, when made. No showing to the contrary was attempted by the defendant, whose proceedings and conduct showed acquiescence in the receivership throughout."

We consider that case favorable to us in that it shows what must exist to constitute acquiescence. *Greenbaum vs. Lafayette & Co.*, 128 Atl. 168 (New Jersey Court of Errors and Appeals, 1925). This case, and some other recent decisions of the New Jersey Courts, cited therein, have been relied on by the respondents. How different that case is from this case appears from the following quotation of the opinion of the Court of Errors and Appeals, at page 168:

"* * * where a receiver is appointed by a court having jurisdiction to make the appointment, the costs and

expenses of the receivership are a first claim on the assets of the corporation of which he is the receiver, and may by the court be placed ahead of mortgages and other liens. In the present case the Court of Chancery was undoubtedly possessed of jurisdiction to make the appointment, even though the jurisdiction was improvidently exercised, and, for the reasons given in the case cited, the order to pay the fees of the receiver and auditor will be affirmed."

In our case, as the Circuit Court of Appeals in its first opinion said (R., 263-266), the District Court had no jurisdiction to appoint receivers, and should have refused to entertain the bill.

4.

The Failure to Appeal from the Order of July 13, 1922.

This is relied on both by the District Court (R., 266, 278) and by the Circuit Court of Appeals (R., 580, 581, 582), as constituting acquiescence. The order of May 11th, 1922, pursuant to which the receivers seized the petitioner's property, was *ex parte* and required the petitioner to show cause before the District Court. That Court, therefore, was the proper place, in the first instance, to attack the validity of the *ex parte* seizure. This attack was there made, vigorously, but unsuccessfully, and the order of July 13th, 1922, was entered. This is the only order before the final decree, which was appealed from, that, under federal practice, could have been appealed from. Prior to the original Act of 1891, constituting the Circuit Courts of Appeal, that order was unappealable. There is nothing, however, in the statute permitting an appeal from that order, or in the decisions thereunder, which make a failure to appeal therefrom an acquiescence. On the contrary, it is elementary that on an appeal from the final decree, which was taken in this case, the appellant may complain of interlocutory orders.

Central Trust Company vs. Seasongood, 130 U. S. 482;

Mendenhall vs. Hall, 134 U. S. 559.

The conduct of the petitioner, between the making of the order of July 13th and the final decree which was appealed from, negatives the idea of acquiescence. At all times from May 18th, 1922, seven days after the original *ex parte* order appointing receivers, until the present, the receivers have known that the defendant was far from acquiescing in and was actively contesting their appointment and right to possess the property and assets of the defendant. At all times, except the period between July 13th, 1922 and October 26th, 1922, the District Court has known from its own records that this active opposition was persisted in. During that last mentioned interval, the bankruptcy proceedings in Delaware were being prosecuted. Those proceedings were actively opposed by the receivers (see the testimony taken before the Special Master, March 22nd, 1924 (R., 371, 374-376), April 11th, 1924 (R., 410)). Moreover, the receivers contend that this bankruptcy proceeding actively hindered their prosecution of their trust. In Exhibit I of April 11, 1924, annexed to the Master's report, is the following item for which the receivers claim credit: Demurrage cost by bankruptcy action, \$1,987. It appears from the testimony that this demurrage was due to the receivers' inability to unload incoming cars of material, pending bankruptcy action (Master's testimony, March 19th, R., 352). Moreover, the receivers, in their report and account said (R., 288):

“* * * the result is entirely due to the continuous opposition of the corporation itself * * *.”

The contempt proceedings against the president and certain directors of the petitioner, which the docket entries show commenced October 26th, 1922, and the order on which was not entered until December 26, 1922, after the decree first appealed from, were based on action taken by those directors which facilitated the bankruptcy proceedings. In the face of all this, how can it possibly be said that the petitioner acquiesced because it did not appeal from the order of July

13, 1922? The bankruptcy proceedings far more effectively interfered with the progress of the receivership than an appeal taken in midsummer.

Of course, if there is something magic about the taking of an appeal, that is the end of it, but no authority to that effect is adduced, and such a holding would be directly contrary to the decision of the New York Court of Appeals in *Hernandez vs. Brookdale Mills*, 134 N. E. 568 (1921).

5.

The Alleged Delay in Intimating Lack of Jurisdiction.

The Circuit Court of Appeals, in its opinion (R., 581) says, as the reason for affirming the District Court:

"Though vigorously opposing the receivers in other ways, the corporation did not intimate a lack of jurisdiction on the part of the Court to appoint receivers until, months after the appointment, a proceeding for contempt was instituted, * * *."

Just how the corporation could more thoroughly have denied the District Court's jurisdiction than by taking the action which brought its directors up for contempt of the order not appealed from is hard to see, but the objection to the decision of the Circuit Court of Appeals goes deeper. That Court admits, in both its opinions (R., 263, 580, 582), that the appointment of the receivers was vigorously opposed at all times. This opposition was based, among other things, on the ground that the corporation was solvent. At all times, the fact of its solvency was urged upon the Court as a reason for not appointing the receivers and why the *ex parte* appointment and seizure pursuant thereto should be set aside. It is true that it cannot be said that the solvency of the corporation was, prior to the contempt proceedings in October, 1922, urged upon the District Court as depriving it of jurisdiction. It was, however, always urged as a reason why the *ex parte* appointment should be revoked, although not on jurisdictional grounds. The Court, therefore, and the receivers, had notice at all times that the validity of the appointment was

attacked. The Court is supposed to know the law and is supposed, therefore, at all times, to have known that the solvency, in fact, of the corporation deprived the Court of jurisdiction to seize its property. The only possible relevancy of acquiescence in any case can be only one of equity and fair dealing. A Court might say that where a corporation, in fact, stands by and permits its property to be seized and managed by receivers, without objecting to such seizure or such management, that corporation cannot later be heard to say that the Court has no right to charge its property with the expenses of the receivership; but where, at all times, the corporation actively opposes the receivership and takes such steps as it is from time to time advised by counsel to take to get its property out of the wrongful grip of the Court, there is nothing unfair or inequitable in the corporation, when it finally succeeds in obtaining an adjudication that the seizure was beyond the jurisdiction of the seizing Court, in demanding that its property be returned unencumbered by the expenses of the receivership. It is not intellectually honest to say that such a corporation acquiesced in the seizure, and it is technical, and inconsistent with enlightened jurisprudence or modern ideas to say that although the corporation did not acquiesce, that because it did not utter the magic cabalistic word "jurisdiction", it must, notwithstanding its continued opposition, have its property charged with the expenses of the void receivership.

III.

Acquiescence cannot possibly justify indebtedness incurred after the acquiescence ceased.

The Courts below justify their decisions because the petitioner did not, prior to the argument on which there was made the final decree of December 22, 1922 (R., 254), say that the Court had no jurisdiction to appoint receivers. Admittedly, from that date, the attack on the jurisdiction was made. Neither of the Courts below contend that the

acquiescence continued thereafter. Much of the receivers' indebtedness was, however, thereafter incurred. For example, the receivers' certificates of \$25,000, with interest, all post-date not only the decree appealed from, but the appeal itself. These certificates were authorized by the *ex parte* order of May 11th, 1922. It appears, however, from the Master's report (R., 430) that the certificates originally borrowed were all paid back December 18, 1922, and no new certificates were issued until May 3, 1923. This was after the appeal was taken and after it had been argued before the Circuit Court of Appeals (R., 262). A party lending money on receivers' certificates is bound to take notice of the state of the record and of the authority or want of authority of the receivers to issue them.

Knickerbocker Trust Co. vs. Onconta, 94 N. E. 871
(New York Court of Appeals, 1911).

What more could the petitioner do than it had then done to prevent further encumbering of its property and what equity is there in preferring the receivers or the person who lent money on these certificates over the diligent petitioner?

IV.

Refutation of certain arguments that may be advanced by the respondents.

It has been intimated that the respondents may urge in support of the decree sought to be reviewed that the first decree of the Circuit Court of Appeals was erroneous and that that Court should have affirmed the appointment of the receivers by the District Court. That first decree of the Circuit Court of Appeals put an end to the receivership as a going concern. The respondents could have asked this Court to review that decree by certiorari. Not having done so, they have acquiesced, and that decree of the Circuit Court of

Appeals has become the law of the case and cannot now be questioned.

Thompson vs. Maxwell Land Grant Co., 168 U. S. 451;

Wakelee vs. Davis, 44 Fed. 532;

Henning vs. Eldredge, 148 Ill. 305, 33 N. E. 754;

Silva vs. Pickard, 47 Pac. 144 (Utah).

In the second place, the first decree of the Circuit Court of Appeals was clearly right. We cannot put the case any better than that Court has done in its opinion (R., 263).

Counsel for the respondents in his brief in the Circuit Court of Appeals used as a basis for his argument of acquiescence certain statements alleged to have been made by the then counsel for the petitioner in the argument before the District Court, pursuant to which that Court made the order of July 13th, 1922. These alleged statements are without foundation in the record and we doubt if they will be relied on in this Court, but as relied on in the Court below they did not amount to an admission that the Court then had jurisdiction to appoint receivers on the application then pending. That jurisdiction was denied, but the alleged statement contained an admission that on final hearing which stage the Court was not then in—the Court would have jurisdiction so to appoint. The lack of jurisdiction to appoint in the then pending proceeding was consistently urged.

Counsel may urge that the District Court had power to appoint a receiver while it was inquiring into the fact of solvency. Whether this be legally valid or not, the fact remains, as the Circuit Court of Appeals, in its first opinion (R., 263), points out, that when the order of July 13th, 1922, was made, the Court found that the corporation was not insolvent. The factual basis for this argument, then, wholly fails.

We have not adverted to any of the details of the receivers' account or criticized at all the Courts below in allowing certain items of disbursements and indebtedness, which were in

the Courts below specifically objected to. We feel that such details are not matters which would interest this Court on an application for certiorari. Should that writ be allowed, we shall have something to say on this subject. What we have discussed we are confident will show this Court that the action of the Court below has not only caused a grave injustice to the petitioner, but has established a very dangerous precedent.

Respectfully submitted,

ROBERT H. McCARTER

G. W. C. McCARTER

Of counsel with Petitioner.